



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS

JAMES E. MCGREEVEY
Governor

SUSAN BASS LEVIN
Commissioner

August 19, 2004

Dear Mayor,

Attached is a memo concerning the "Highlands Water Protection and Planning Act" that Governor James E. McGreevey signed into law on August 10, 2004. The memo contains guidelines and instructions to assist all local government units, whether county or municipal, in properly discharging their responsibilities with regard to the processing, review and enforcement of applications for development in the Preservation Area of the Highlands Region from the date of enactment of the Act until the date of adoption of the regional master plan. Municipal and county governing bodies are requested to distribute copies to all agencies under their jurisdiction having such authority. The following are the main points of the memo:

1. The procedures and requirements described in these guidelines and instructions apply only within the boundaries of the Preservation Area. The boundaries of the Preservation Area are established by the Act. The DEP Highlands website at <http://www.nj.gov/dep/highlands> includes a detailed map and description of the Highlands Preservation Area that will enable local officials and the public to readily determine whether a piece of land is within the Preservation Area or not.
2. From August 10, 2004 until such time as rules for the "Highlands Permitting Review Program" are adopted by DEP, which shall be not later than May 7, 2005, all "major Highlands development" requires a "Highlands Preservation Area approval" from DEP in order to proceed. The memo includes the statutory definition of what constitutes a "major Highlands development" as well as the statutory language concerning the categories of development that are exempt from the provisions of the Act.
3. Any project within the definition of "major Highlands development" that may be underway in the Preservation Area and that does not have a Highlands Preservation Area approval must stop immediately, unless it is in one of the above exempt categories. Please note that the exemption for projects that received municipal approval and at least one DEP approval only applies if those approvals were received on or before March 29, 2004. A list of applicants who received local approvals after March 29, 2004 should be provided to DEP, so that DEP can contact those applicants with additional information to assist them with compliance.



4. The Act contains stringent environmental requirements that applicants for a Highlands Preservation area approval must meet. These requirements, along with additional specified requirements, are required to be contained in the DEP rules and regulations establishing the permanent Highlands permitting review program that will become effective on or before May 7, 2005. Implementation of these requirements will greatly restrict the kinds of major Highlands developments that may otherwise occur in the preservation area and will significantly affect the design of the major Highlands developments that are allowed to proceed.
5. Applicants should be advised by local government units that an applicant has the option of applying to DEP prior to filing an application with the local government unit, thereby resolving any issue that might arise in the course of a DEP Highlands review and avoiding the possibility of having to resubmit the application for further municipal review.
6. Any local government unit that has before it an application for development in the Preservation Area should proceed carefully and use as much of the time allowed by statute for the review of the application as may be necessary to consider the applicability of the Act. At the same time, however, it is important to note that the time frames for approval under the Municipal Land Use Law still applies, and it is necessary to take action within those statutory time frames in order to avoid granting an automatic approval by inaction.
7. As of August 10, 2004, "designated sewer service area" within the Preservation Area, if wastewater collection systems have not been installed, have been revoked. Associated treatment works approvals in those impacted areas are also revoked. Any new sewer construction in the Preservation Area not currently sewerred should be reported to DEP.

If you have any questions regarding the above, please do not hesitate to contact Brian Bauerle, Director of Governmental Relations, at (609) 292-6420.

Sincerely,



Susan Bass Levin
Commissioner

c: Municipal Clerk
Secretary of the Zoning Board
Secretary of the Planning Board

On August 10, 2004, Governor James E. McGreevey signed the "Highlands Water Protection and Planning Act." Under this landmark legislation, State and local governments will work together to protect the incomparable water resources and natural beauty of the New Jersey Highlands, while also providing opportunities for appropriate economic growth and development to advance the quality of life of residents of the region and of all New Jerseyans.

These guidelines and instructions, which have been prepared by the Department of Community Affairs in consultation with the Department of Environmental Protection (DEP), are intended to assist all local government units, whether county or municipal, in properly discharging their responsibilities with regard to the processing, review and enforcement of applications for development in the Preservation Area of the Highlands Region from the date of enactment of the Act until the date of adoption of the regional master plan. It is intended to guide municipal and county governing bodies, county, municipal and regional planning boards and health agencies, zoning boards of adjustment, sewerage and utilities authorities and any other municipal, regional or county agencies having authority over applications for development in municipalities that are entirely or partially within the Preservation Area. Municipal and county governing bodies are requested to distribute copies to all agencies under their jurisdiction having such authority.

The boundaries of the Preservation Area are established by the Act. The procedures and requirements described in these guidelines and instructions apply only within the boundaries of the Preservation Area. The DEP Highlands website at <http://www.nj.gov/dep/highlands> includes a detailed map and description of the Highlands Preservation Area that will enable local officials and the public to readily determine whether a piece of land is within the Preservation Area or not. The website also describes the exemptions to the Act, a list of the enhanced environmental standards in effect as of August 10, 2004 and a directory of related DEP programs.

Effective August 10, 2004, and until such time as rules for the "**Highlands Permitting Review Program**" are adopted by DEP, which shall be not later than May 7, 2005, all "**major Highlands development**" requires a "**Highlands Preservation Area approval**" in order to proceed.

The statutory definition of "**major Highlands development**" is as follows:

"Major Highlands development" means, except as otherwise provided pursuant to subsection a. of section 30 of this act, (1) any non-residential development in the preservation area; (2) any residential development in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more; (3) any activity undertaken or engaged in the preservation area that is not a development but results in the ultimate disturbance of one-quarter acre or more of forested area or that results in a cumulative increase in impervious surface by one-quarter acre or more on a lot; or (4) any capital or other project of a State entity or local government unit in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more. Major Highlands development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.

The **exceptions** set forth in subsection a. of section 30 are as follows:

The following are exempt from the provisions of this act, the regional master plan, any rules or regulations adopted by the Department of Environmental Protection pursuant to this act, or any amendments to a master plan, development regulations, or other regulations adopted by a local government unit to specifically conform them with the regional master plan:

(1) the construction of a single family dwelling, for an individual's own use or the use of an immediate family member, on a lot owned by the individual on the date of enactment of this act or on a lot for which the individual has on or before May 17, 2004 entered into a binding contract of sale to purchase that lot;

(2) the construction of a single family dwelling on a lot in existence on the date of enactment of this act, provided that the construction does not result in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more;

(3) a major Highlands development that received on or before March 29, 2004:

(a) one of the following approvals pursuant to the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.):

(i) preliminary or final site plan approval;

- (ii) *final municipal building or construction permit;*
- (iii) *minor subdivision approval where no subsequent site plan approval is required;*
- (iv) *final subdivision approval where no subsequent site plan approval is required; or*
- (v) *preliminary subdivision approval where no subsequent site plan approval is required; and*

(b) *at least one of the following permits from the Department of Environmental Protection, if applicable to the proposed major Highlands development:*

(i) *a permit or certification pursuant to the "Water Supply Management Act," P.L.1981, c.262 (C.58:1A-1 et seq.);*

(ii) *a water extension permit or other approval or authorization pursuant to the "Safe Drinking Water Act," P.L.1977, c.224 (C.58:12A-1 et seq.);*

(iii) *a certification or other approval or authorization issued pursuant to the "The Realty Improvement Sewerage and Facilities Act (1954)," P.L.1954, c.199 (C.58:11-23 et seq.); or*

(iv) *a treatment works approval pursuant to the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.); or*

(c) *one of the following permits from the Department of Environmental Protection, if applicable to the proposed major Highlands development, and if the proposed major Highlands development does not require one of the permits listed in subsubparagraphs (i) through (iv) of subparagraph (b) of this paragraph:*

(i) *a permit or other approval or authorization issued pursuant to the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et seq.); or*

(ii) *a permit or other approval or authorization issued pursuant to the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.).*

The exemption provided in this paragraph shall apply only to the land area and the scope of the major Highlands development addressed by the qualifying approvals pursuant to subparagraphs (a) and (b), or (c) if applicable, of this paragraph, shall expire if any of those qualifying approvals expire, and shall expire if construction beyond site preparation does not commence within three years after the date of enactment of this act;

(4) *the reconstruction of any building or structure for any reason within 125% of the footprint of the lawfully existing impervious surfaces on the site, provided that the reconstruction does not increase the lawfully existing impervious surface by one-quarter acre or more. This exemption shall not apply to the reconstruction of any agricultural or horticultural building or structure for a non-agricultural or non-horticultural use;*

(5) *any improvement to a single family dwelling in existence on the date of enactment of this act, including but not limited to an addition, garage, shed, driveway, porch, deck, patio, swimming pool, or septic system;*

(6) *any improvement, for non-residential purposes, to a place of worship owned by a nonprofit entity, society or association, or association organized primarily for religious purposes, or a public or private school, or a hospital, in existence on the date of enactment of this act, including but not limited to new structures, an addition to an existing building or structure, a site improvement, or a sanitary facility;*

(7) *an activity conducted in accordance with an approved woodland management plan pursuant to section 3 of P.L.1964, c.48 (C.54:4-23.3) or the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;*

(8) *the construction or extension of trails with non-impervious surfaces on publicly owned lands or on privately owned lands where a conservation or recreational use easement has been established;*

(9) *the routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by a State entity or local government unit, provided that the activity is consistent with the goals and purposes of this act and does not result in the construction of any new through-capacity travel lanes;*

(10) *the construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit, provided that the activity does not result in the construction of any new through-capacity travel lanes;*

(11) *the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act;*

(12) *the reactivation of rail lines and rail beds existing on the date of enactment of this act;*

(13) *the construction of a public infrastructure project approved by public referendum prior to January 1, 2005 or a capital project approved by public referendum prior to January 1, 2005;*

(14) the mining, quarrying, or production of ready mix concrete, bituminous concrete, or Class B recycling materials occurring or which are permitted to occur on any mine, mine site, or construction materials facility existing on June 7, 2004;

(15) the remediation of any contaminated site pursuant to P.L.1993, c.139 (C.58:10B-1 et seq.);

(16) any lands of a federal military installation existing on the date of enactment of this act that lie within the Highlands Region; and

(17) a major Highlands development located within an area designated as Planning Area 1 (Metropolitan), or Planning Area 2 (Suburban), as designated pursuant to P.L.1985, c.398 (C.52:18A-196 et seq.) as of March 29, 2004, that on or before March 29, 2004 has been the subject of a settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court, to satisfy the constitutional requirement to provide for the fulfillment of the fair share obligation of the municipality in which the development is located. The exemption provided pursuant to this paragraph shall expire if construction beyond site preparation does not commence within three years after receiving all final approvals required pursuant to the "Municipal Land Use Law," P.L.1975, c.291 (C.40:55D-1 et seq.).

Any project within the definition of "major Highlands development" that may be underway in the Preservation Area and that does not have a Highlands Preservation Area approval must stop immediately, unless it is in one of the above exempt categories. Please note that the exemption for projects that received municipal approval and at least one DEP approval only applies if those approvals were received on or before March 29, 2004. A list of applicants who received local approvals after March 29, 2004 should be provided to DEP, so that DEP can contact those applicants with additional information to assist them with compliance. The list, which should include, in addition to contact information for the applicant, the block, lot and street address of the property, should be sent to Assistant Commissioner Lisa Jackson, Compliance and Enforcement, PO Box 422, Trenton, New Jersey 08625._

The Act's initial land use and water protection provisions include requirements concerning 300 foot buffers to surface water bodies, intermittent streams and wetlands, water quality considerations, reduced threshold for water-diversion, flood hazard areas, impervious surfaces, steep slopes and upland forested areas. In addition to these requirements, requirements concerning septic system density, freshwater wetlands and the limitation or prohibition on the construction or extension of public water systems to serve development in the preservation area will be implemented after the DEP rules and regulations establishing the permanent Highlands permitting review program become effective on or before May 7, 2005. Implementation of these requirements through Highlands Preservation Area approval and the permanent Highlands permitting review programs will greatly restrict the kinds of major Highlands developments that may otherwise occur in the preservation area and will significantly affect the design of the major Highlands developments that are allowed to proceed.

Section 32 of the Act provides that *"the Highlands Preservation Area approval shall consist of the related aspects of other regulatory programs which may include, but need not be limited to, the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et seq.), "The Endangered and Nongame Species Conservation Act," P.L.1973, c.309 (C.23:2A-1 et seq.), the "Water Supply Management Act," P.L.1981, c.262 (C.58:1A-1 et seq.), the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), "The Realty Improvement Sewerage and Facilities Act (1954)," P.L.1954, c.199 (C.58:11-23 et seq.), the "Water Quality Planning Act," P.L.1977, c.75 (C.58:11A-1 et seq.), the "Safe Drinking Water Act," P.L.1977, c.224 (C.58:12A-1 et seq.), the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), and any rules and regulations adopted pursuant thereto."* The "need not be limited to" language means that this is not a comprehensive list of all subjects for review in this approval process. All local government units responsible for reviewing applications for local approvals in the Preservation Area must do so with full awareness on the part of all parties concerned that any local approval of a non-exempt major Highlands development, if granted, must be made contingent upon receipt of either a Highlands Preservation Area approval or, once the Highlands Permitting Review Program rules are adopted and take effect, of an approval under those rules.

Applicants should be advised by local government units having approval authority that an applicant has the option of applying for a Highlands Preservation Area approval **prior** to filing an application with the local government unit,

thereby resolving any issue that might arise in the course of a DEP review and avoiding the possibility of having to resubmit the application for further municipal review. Applicants should also be advised that the rules for the Highlands Permitting Review Program, when they are adopted, would apply to any development that had not yet obtained a Highlands Preservation Area approval, even if it had been approved by the local government unit, and it might still have to be changed in order to meet new DEP requirements, perhaps necessitating a new filing with the local government unit as well.* This option would be applicable, not only to applications for development under the Municipal Land Use Law, but also to

applications for certification of water supply facilities and sewerage systems by local health agencies under the Realty Improvement and Sewerage Facilities Act (1954), to soil erosion and sediment control plans under the Soil Erosion and Sediment Control Act, to applications for approval of or connection to sewerage or water distribution facilities under the Sewerage Authorities Law or the Municipal and County Utilities Authorities Law, to applications for connection to sewerage or water supply facilities operated under the Municipal and County Sewerage Act or the County and Municipal Water Supply Act, or to applications to a municipality to provide any utility service regulated under by the Board of Public Utilities.

Any local government unit that has before it an application for development in the Preservation Area should proceed carefully and use as much of the time allowed by statute for the review of the application as may be necessary to consider the applicability of the Act. At the same time, however, it is important to note that the time frames for approval under the Municipal Land Use Law would still apply, and it is necessary to take action within those time frames in order to avoid granting an automatic approval by inaction. These time frames include 120 days for variances, 45 days for final site plan and major subdivision applications, minor subdivision applications, preliminary applications involving 10 acres or less and 10 or less dwelling units and for subdivision applications with not more than ten lots and 95 days for preliminary larger preliminary site plan and subdivision applications.

As of August 10, 2004, designated sewer service areas that are within the Preservation Area and for which wastewater collection systems have not been installed have been revoked, and associated treatment works approvals in those impacted areas have expired. Any new sewer construction in portions of the Preservation Area not currently sewerred should be reported to DEP so that appropriate determinations can be made.

A list of municipalities that are either wholly or partially located within the Preservation Area is enclosed for your information.

*There may be certain circumstances in which a local government unit might deem it advisable to deny an application due to uncertainty about DEP requirements. Should such a case arise, the local government unit and its counsel might wish to review the case of *Morris County Fair Housing Council v. Boonton Township*, 228 N.J. Super. 635 (Law Division, 1988), in which the court upheld a denial of an application by the planning board because DEP had not yet decided what modifications had to be made to a dam and reservoir, and these modifications were directly related to the adequacy of the stormwater system the board was reviewing.